

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

THE UNITED STATES OF AMERICA,)
COMMONWEALTH OF KENTUCKY,)

Plaintiffs,)

v.)

Case No. 06-102-KSF

CITY OF WINCHESTER, KENTUCKY,)
and WINCHESTER MUNICIPAL)
UTILITIES,)

Defendants.)

AMENDED COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the Commonwealth of Kentucky, acting at the request of its Environmental and Public Protection Cabinet, file this complaint and allege as follows:

NATURE OF ACTION

1. This is a civil action for penalties and injunctive relief brought under Section 309 of the Clean Water Act ("the Act"), 33 U.S.C. § 1319, against the City of Winchester, Kentucky ("City") and Winchester Municipal Utilities ("WMU"), for discharges of pollutants in violation of Section 301 of the Act, 33 U.S.C. § 1311, including discharges of pollutants from unpermitted point sources, and for violations of other conditions established in a National Pollutant Discharge Elimination System ("NPDES") permit issued to the City and WMU by the Kentucky

Department for Environmental Protection (“KDEP”) pursuant to its EPA-approved permit program under Section 402 of the Act, 33 U.S.C. § 1342. The Commonwealth of Kentucky (“Kentucky”) has joined this complaint as a co-plaintiff pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to Section 309(b) of the Act, 33 U.S.C. §§ 1319(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. The United States has authority to bring this action on behalf of the Administrator of EPA (“Administrator”) under Section 506 of the Act, 33 U.S.C. § 1366.

4. Venue is proper in the Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1391(b) and 1395, because it is the judicial district in which the City and WMU are located and in which the alleged violations occurred.

DESCRIPTION OF DEFENDANTS

5. The City is a municipality under Kentucky law. The City owns and operates a wastewater treatment plant, along with approximately 144 miles of collection and transmission systems, pursuant to the terms of an NPDES permit issued under Section 402(b) of the Act, 33 U.S.C. § 1342. Such facilities are located throughout the City, and surrounding areas. WMU is a public utility organized under Kentucky law by the City. Together with the City, WMU operates the City’s wastewater collection, transmission and treatment systems.

CLEAN WATER ACT REQUIREMENTS

6. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of pollutants” by any person into waters of the United States except in compliance with that

Section, including, where applicable, an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

7. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue an NPDES permit which authorizes the discharge of any pollutant, but only in compliance with the applicable requirements of Section 301 of the Act, 33 U.S.C. § 1311, and such other conditions as the Administrator determines are necessary to carry out the provisions of the Act.

8. Section 402(b) of the Act, 33 U.S.C. § 1342(b), provides that EPA may approve a state NPDES permitting program within its jurisdiction. Kentucky, through KDEP, is authorized to issue NPDES permits in Kentucky, and does so in accordance with Kentucky's Environmental Protection Statute, KRS Chapter 224.10-100 and .16-050.

9. Section 309(b) of the Act, 33 U.S.C. § 1319(b), authorizes the Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person is in violation of, inter alia, Section 301 of the Act, 33 U.S.C. § 1311, or any permit condition or limitation in an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

10. Section 309(d) of the Act, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the Act, 33 U.S.C. § 1311, or violates any permit condition or limitation in a NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$27,500 per day for each violation which takes place after January 30, 1997, but before March 15, 2004; and \$32,500 per day for each violation which takes place on or after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of

1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701 note; Pub. L. 104-134, enacted April 26, 1996; 110 Stat. 1321).

GENERAL ALLEGATIONS

11. At all times relevant herein, the City and WMU have owned and operated a wastewater treatment plant (“WWTP”), and its associated collection and transmissions systems, which receive and treat wastewater from residential, commercial, and industrial sources within the City and surrounding areas. The collection and transmission systems for the WWTP include, *inter alia*, gravity sewer lines, force mains, pump stations and manholes.

12. At all times relevant herein, both the City and WMU were persons, within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

13. The WWTP, and its associated collection and transmission systems, are a “treatment works” within the meaning of Section 212(2) of the Act, 33 U.S.C. § 1292(2). The treatment works includes point sources within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

14. At all times relevant herein, the City and WMU have “discharged pollutants” from their treatment works within the meaning of Sections 502(6) and (12) of the Act, 33 U.S.C. §§ 1362(6), (12) from “point sources” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), into Strodes Creek and its system of tributaries and river basins.

15. Strodes Creek, and its system of tributaries and river basins, are “navigable waters” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2. Strodes Creek has been designated by Kentucky, in accordance with 401 KAR 5:026,

Section 5(2), for the use of warm water aquatic habitat, primary and secondary contact recreation, and domestic water supply. Strodes Creek has been identified by Kentucky as an impaired waterway pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), due to excessive nutrients, siltation, organic enrichment/low dissolved oxygen and pathogens.

16. Pursuant to Section 402(a) of the Act, 33 U.S.C. § 1342(a), and 401 KAR 5:050 to 5:055 (1994), KDEP issued NPDES permit No. KY0037991 to the City and WMU on March 23, 2004.

17. At all relevant times herein, the NPDES permit issued to the City and WMU authorized the discharge of pollutants from specified point sources within the WWTP to Strodes Creek, subject to certain limitations and conditions set forth in the NPDES permit.

18. The NPDES permit establishes certain limitations on, *inter alia*, the mass and concentration of pollutants the City and WMU may discharge from the WWTP during a given period. *See* NPDES Permit, Part I. The NPDES permit also requires the City and WMU to monitor their discharges and submit periodic Discharge Monitoring Reports to KDEP. *See id.*, Part III, Page III-1; 401 KAR 5:065, Section 1(10), (12).

19. The NPDES permit prohibits bypasses that are not “essential maintenance to assure efficient operation.” *See* NPDES Permit, Part II, Page II-1; 401 KAR 5:065, Section 1(13).

20. The NPDES permit requires the City and WMU at all times to “properly operate and maintain all facilities and systems of treatment and control and related appurtenances which are installed or used by the permittee to achieve compliance with the conditions” of their NPDES permit. *See* NPDES Permit, Part II, Page II-1; 401 KAR 5:065, Section 1(5).

21. The NPDES permit requires the City and WMU to take representative samples of

their influent and effluent, and to report monitoring accurately. *See* NPDES Permit, Part III, Page III-1; 401 KAR 5:065, Section 1(10)(a), (12).

FIRST CLAIM FOR RELIEF
UNPERMITTED DISCHARGES

22. Paragraphs 1 through 21 are realleged and incorporated herein by reference.

23. On numerous occasions, since at least January 2000, the City and WMU experienced sanitary sewer overflows, or discharges of untreated wastewater containing pollutants from point sources within their treatment works, including the plant and its collection and transmission systems, that were not identified in the NPDES permit as authorized outfalls (“SSOs”). These SSOs include leaks, defects, blockages, and surcharged manholes, as well as discharges from eight unauthorized overflow points in the collection system, including four located at the Snowfall Lane, Maryland Avenue, Smith Manor and Bel-Air Drive pump stations. None of these discharges was permitted or otherwise authorized by the Act.

24. Each day of each unpermitted discharge by the City and WMU described in paragraph 23 is a separate violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

25. The City and WMU continue to violate the Act by discharging wastewater containing pollutants without a permit from point sources, including the collection and transmission systems, that are not identified in the NPDES permit as authorized outfalls. Unless restrained by an order of the Court, the City and WMU will continue to discharge pollutants from point sources without a permit or other authorization in violation of the Act.

SECOND CLAIM FOR RELIEF
VIOLATION OF PROHIBITION AGAINST BYPASS

26. Paragraphs 1 through 25 are realleged and incorporated herein by reference.

27. The SSOs described in paragraph 23 are prohibited bypasses under Part II of the NPDES permit, which imposes a standard condition prohibiting bypasses that are not “essential maintenance to assure efficient operation.” *See* NPDES Permit, Part II, Page II-1; 401 KAR 5:065, Section 1(13).

28. On numerous occasions since at least January 2000, the City and WMU have allowed untreated influent wastewater to bypass treatment at the plant through a structure adjacent to the influent pumps at the treatment plant. When the plant influent flow rate reaches a certain level, a portion of the influent wastewater flow is released through the bypass structure. The bypass flow is routed through a rectangular box culvert and then to an open channel that runs along the perimeter fence of the treatment plant. The open channel then re-combines with treated wastewater downstream of the sampling point for the permitted Outfall 001. These bypasses are prohibited under Part II of the NPDES permit because they are not “essential maintenance to assure efficient operation.” *See* NPDES Permit, Part II, Page II-1; 401 KAR 5:065, Section 1(13).

29. Each day of each violation of bypass prohibition of the NPDES permit is a separate violation.

30. The City and WMU continue to violate the bypass prohibition of the NPDES permit. Unless restrained by an order of the Court, the City and WMU will continue to violate the bypass prohibition of their NPDES permit.

THIRD CLAIM FOR RELIEF
MANAGEMENT, OPERATION AND MAINTENANCE VIOLATIONS

31. Paragraphs 1 through 30 are realleged and incorporated herein by reference.

32. Many of the SSOs and bypasses alleged in paragraphs 23, 27 and 28 resulted, in whole or in part, from the failure by the City and WMU to properly manage, operate and maintain their treatment works, including the plant and its collection and treatment systems, and the failure to have on-line and in operation those systems of treatment and control necessary to achieve compliance with the NPDES permit. Proper management, operation and maintenance would have ensured that the City and WMU could have transported sewage and pollutants through their collection, transmission and treatment systems without SSOs or bypasses.

33. The City and WMU violated the operation and maintenance ("O&M") provisions of its NPDES permit on each occasion of an SSO, bypass or overflow. *See* 401 KAR 5:065, Section 1(5).

34. Each day of each violation of O&M provisions of the NPDES permit is a separate violation.

35. The City and WMU continue to violate the O&M provisions of the NPDES permit. Unless restrained by an order of the Court, the City and WMU will continue to violate the O&M provisions of the NPDES permit.

FOURTH CLAIM FOR RELIEF
NON-REPRESENTATIVE SAMPLING

36. Paragraphs 1 through 35 are realleged and incorporated herein by reference.

37. On numerous occasions between January 2000 and the date this Complaint is filed, the City and WMU violated the requirement of the NPDES permit that they conduct

representative sampling by monitoring Outfall 001 effluent at a point upstream of the introduction of untreated bypass wastewater. *See* NPDES Permit, Part III, Page III-1; 401 KAR 5:065, Section 1(10)(a), (12). By monitoring in this fashion, the City and WMU produced nonrepresentative samples, because the samples did not measure the pollutant mass or concentration in the bypass wastewater stream.

38. Each day of each violation of the representative sampling requirement of the NPDES permit described in paragraph 37 is a separate violation of the NPDES permit. Unless restrained by an order of the Court, the City and WMU will continue to violate the representative sampling requirement of their NPDES permit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the United States of America and the Commonwealth of Kentucky, request that the Court enter judgment on behalf of the United States and the Commonwealth of Kentucky as follows:

A. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), order the City and WMU to undertake a program to achieve permanent and consistent compliance with all terms and conditions of the NPDES permit, the Clean Water Act, and the regulations promulgated thereunder for the treatment works, including the plant and its collection and transmission systems;

B. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), assess civil penalties against the City and WMU of up to \$27,500 per day for each day of violation that occurred prior to March 15, 2004, and up to \$32,500 per day for each day of violation that occurred on or after March 15, 2004;

C. Award the United States and the Commonwealth of Kentucky their costs in the action; and

D. Grant the United States and the Commonwealth of Kentucky such other relief as the Court deems appropriate.

Respectfully submitted,

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